LIBRARY
SUPREME COURT, U. S.

FILED
MAR 28 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of The United States

October Term, 1967

No. 1180

HUNTINGTON TRUST & SAVINGS BANK,
a corporation,
Petitioner

vs.

H. B. AGSTEN & SONS, INC.,
a corporation,
BERNARD L. BOUTIN, ADMINISTRATOR,
SMALL BUSINESS ADMINISTRATION, and
ODUS R. KINCAID and DELBERT E. WILLIAMS,
TRUSTEES, WILLIAM H. MEINERS, d.b.a.
GENERAL FLOOR COMPANY,
Respondents.

BRIEF FOR RESPONDENTS H. B. AGSTEN & SONS, INC. and WILLIAM H. MEINERS, d.b.a. GENERAL FLOOR COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SPILMAN, THOMAS,
BATTLE &
KLOSTERMEYER
William B. Maxwell, III
Of Counsel

HOWARD R. KLOSTERMEYER
P. O. Box 273
Charleston, West Virginia
Attorney for Respondents

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT	3
REASONS WHY CERTIORARI SHOULD BE DENIED	4
I. The Decision of the Court Below Does Not Hamper the Administration of the Small Business Act	4
II. The Decision of the Court Below Does Not Involve an Important Question of Federal Law which this Court has never Decided and which should be Decided By this Court	6
a. State not federal law is ultimately determinative in this case	6
b. Construction of Federal Insolvency Statute not fairly raised by case	9
III. The Decision is Consistent with Those of other Federal Courts	10
IV. The Decision is Consistent with Applicable State Law	11
V. The Decision of the Court of Appeals is Plainly Right	11
CONCLUSION	12

TABLE OF CITATIONS

Statutes

	Page
Official Code of West Virginia, Chapter 38, Article 2, Section 17	3, 11
31 U.S.C. §191	3, 5, 9, 10
15 U.S.C. §636(a)	3

Cases

Brown v. *General Laundry Service*, 139 Conn. 363, 94 A. 2d 10 (1952)	6
Brown v. *General Laundry Service*, 19 Conn. Supp. 355, 113 A. 2d 601 (1955)	7
Buffalo Savings Bank v. *Victory*, 62-1 U.S.T.C. § 9106 (Supreme Court of N. Y. 1961)	8
Citizens National Bank v. *Harrison-Doddridge Coal Co.*, 89 W. Va. 659, 109 S. E. 892, 894	9
Exchange Bank & Trust Co. v. *Tubb Manufacturing Co.*, 246 F. 2d 141	10
Hopkins v. *Eureka Coal Company*, 33 Am. Fed. Tax Rep. 1627 (1944)	11
In Re Lieb Bros., Inc., 251 F. 2d 306	10
Martin v. *Kester*, 46 W. Va. 438 33 S. E. 238	9
Poage v. *Bell*, 8 Leigh 604 (1837)	9
River Rouge Savings Bank v. *Victor Building Co.*, 359 Mich. 189, 101 N. W. 2d 260 (1960)	8
S.B.A. v. *McClellan*, 364 U. S. 446, 81 S. Ct. 191, 5 L. Ed. 2d 200	4

Page

Samms v. *Chicago Title & Trust Co.*, 349 Ill. App. 413, 111 N. E. 2d 172 (1953) 7

Southern Ohio Savings Bank & Trust Co. v. *Bolce and Renner* v. *Merriweather*, 165 Ohio St. 201, 135 N. E. 2d 382 (1956) 8

United States v. *Buffalo Savings Bank*, 371 U. S. 228, 9 L. Ed. 283, 83 S. Ct. 314 8

United States of America v. *City of New Britain, Connecticut*, 347 U. S. 81, 98 L. Ed. 520, 74 S. Ct. 367 6

United States v. *Hooe*, 3 Cranch 73 9

United States v. *Lord*, 155 F. Supp. 105 (D.N.H. 1957) 10

United States v. *Texas*, 314 U. S. 480, 484, 62 S. Ct. 350, 354, 86 L. Ed. 356 9

IN THE

Supreme Court of The United States

October Term, 1967

No. 1180

HUNTINGTON TRUST & SAVINGS BANK,
a corporation,
Petitioner

vs.

H. B. AGSTEN & SONS, INC.,
a corporation,
BERNARD L. BOUTIN, ADMINISTRATOR,
SMALL BUSINESS ADMINISTRATION, and
ODUS R. KINCAID and DELBERT E. WILLIAMS,
TRUSTEES, WILLIAM H. MEINERS, d.b.a.
GENERAL FLOOR COMPANY,
Respondents.

BRIEF FOR RESPONDENTS H. B. AGSTEN & SONS, INC. and WILLIAM H. MEINERS, d.b.a. GENERAL FLOOR COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS BELOW

See appendix to Petition pp. 44-64.

JURISDICTION

The jurisdictional requirements are adequately set forth in the Petition.

QUESTIONS PRESENTED

The only question presented is the proper resolution of a circuity of liens problem which arose among the mechanic's lien of the Respondent contractor, H. B. Agsten & Sons, Inc., (which included the lien claim of a supplier William H. Meiners d.b.a. General Floor Company) the trust deed lien of the Petitioner Huntington Trust & Savings Bank and the trust deed lien of the Small Business Administration.

The question was resolved below in accordance with a line of circuity cases involving federal tax liens. The burden of these cases was that the federal government was concerned only with establishing its own priority; that once sufficient money was set aside to insure its priority under federal law allocation of the balance was determined by state law.

More narrowly then the issue is whether this principle is applicable to a circuity problem involving an S.B.A. lien, as the Special Master, District Court and six members of the Court of Appeals concluded, or whether as petitioner contends, the circumstance that the federal lien was held by the Small Business Administration rather than the Internal Revenue Service requires a different solution.

STATUTES INVOLVED

The West Virginia statute which the Court below (speaking through Judge Sobeloff) held controlled the priorities of liens as between Petitioner and Respondent is Section 17, Article 2, Chapter 38 of the official Code of West Virginia of 1931, as amended, which reads as follows:

> "*All of the liens authorized and created by this article shall,* except as provided in section thirty-one of this article, *have priority over any and all other liens created by trust deed or otherwise,* on such building or other structure and improvements appurtenant thereto and on the interest of the owner in the lot of ground whereon the same stands or to which the same may have been removed, *subsequently to the time when such labor shall have begun to be performed, or such material or machinery or other necessary equipment shall have begun to be furnished.*" (our italics)

The two federal statutes cited by Petitioner, R.S. § 3466, 31 U.S.C. § 191 and 15 U.S.C. § 636(a) are not pertinent to the resolution of the question at issue.

STATEMENT

Petitioner's statement is misleading in that it asserts a correlation between the loans of the Bank and the S.B.A. which is substantiated neither by the pleadings nor by the evidence. The Courts below treated them as distinct and competitive, as the record requires.

REASONS WHY CERTIORARI SHOULD BE DENIED

I. The Decision of the Court Below Does Not Hamper the Administration of the Small Business Act.

This case is of importance only to the parties litigant. The decision below turns upon the unique facts of this case and will affect few (if any) other persons in the United States. This is so because few, if any, prudent banks or any other institutions lending money for construction purposes, will be as careless as was Petitioner in failing to obtain waivers of mechanics' liens before advancing construction money after construction has been under way for almost four months.

Petitioner's evident purpose, in its imaginative reconstruction of the record, is to bring the case within the ambit of *S.B.A.* v. *McClellan*, 364 U. S. 446, 81 S. Ct. 191, 5 L. Ed. 2d 200. Had Petitioner assigned its note and deed of trust to the S.B.A., the McClellan case might have some relevance. In the instant case Petitioner's loan and that of S.B.A. were separate and distinct and were so treated by the District Court and the Court of Appeals. Petitioner did not participate in the S.B.A. loan as did the lender in the McClellan case. Nor did Petitioner assign its interest in its loan to the S.B.A. Moreover, there is no evidence in the record that Petitioner's loan was "made in conjunction with the S.B.A. loan" or that it was to be disbursed "concurrently with the S.B.A. loan", or that it was "one of the conditions of said S.B.A. loan". There is nothing in the record to indicate that the S.B.A.

obligated itself to pay off Petitioner's loan. Certainly no such correlation or obligation can reasonably be inferred from the usual and customary second deed of trust language found in the S.B.A.'s trust deed that "this deed of trust and the warranty of title are made subject to and subordinate to . . ." Petitioner's prior deed of trust.

Having no deed of trust or other collateral security the private lender in the McClellan case required other means of securing himself. This was accomplished by a joint participation with the S.B.A., to which he assigned his obligation and who asserted its priority under the Federal Insolvency Statute. 31 U.S.C. 191.

It is useless to speculate what the result in the present case would have been if the S.B.A. had purchased and taken an assignment of the Bank's deed of trust since such was not the case. The S.B.A., in the instant case was, properly, concerned only with its own recovery.

Petitioner's argument that the lower court's decision will handicap the administration of the Small Business Act may be answered by pointing out that those charged with the administration of that Act by Congress apparently don't share the imagined fears of the Petitioner. They have neither appealed from the decision of the District Court nor from the decision of the Circuit Court of Appeals in this case. It may also be answered that by pointing out that the Petitioner as a construction lender could have avoided its problem by doing what any prudent construction lender would have done, i.e. required mechanics' lien

waivers. The administration of the Small Business Act is certainly not handicapped by requiring a construction lender to exercise that prudence a lender should observe were no federal agency involved.

II. The Decision of the Court Below Does Not Involve An Important Question of Federal Law Which This Court Has Never Decided and Which Should Be Decided by This Court.

(a) State not federal law is ultimately determinative in this case.

The court below clearly and succintly stated that the priorities of their respective liens as between the Petitioner and this Respondent were determined by West Virginia law wherein the majority of the Court, speaking through Judge Sobeloff said:

> "In short, while the Bank complains that it is the only party which suffers from this District Court's disposition, the fact is that it '*suffers*' only in the sense that *by the operation of the West Virginia law and not by reason of the Federal Insolvency Statute*, it will regain only about half of its loan." pp 51-52 of Petition. (italics ours)

The case from which all circuity cases subsequent to 1954 have taken their cue is *United States of America* v. *City of New Britain, Connecticut*, 347 U. S. 81, 98 L. Ed. 520, 74 S. Ct. 367, which was an appeal from the Connecticut case of *Brown* v. *General Laundry Service*, 139 Conn. 363, 94 A. 2d 10 (1952).

The Supreme Court reversed the Connecticut Court decision which subordinated federal tax liens not only to mortgages and a judgment, but to water rents and real estate taxes saying:

> "The United States is not interested in whether the State receives its taxes and water rents prior to mortgagees and judgment creditors. *This is a matter of state law.* But as to any funds in excess of the amount necessary to pay the mortgage and judgment creditors, Congress intended to assert the federal lien. There is nothing in the language of § 3672 to show that Congress intended antecedent federal tax liens to rank behind any but the specific categories of interests set out therein, and the legislative history lends support to this impression." (our italics)

On remand the solution indicated by the Supreme Court, and previously utilized by a now much cited Illinois case was followed, and the Connecticut Court required that the amounts as to which the mortgagees and judgment creditor had priority be first applied in inverse order of their own respective priorities to the satisfaction of the local tax and water rent liens. *Brown* v. *General Laundry Service*, 19 Conn. Supp. 355; 113 A. 2d 601 (1955)

The Illinois case, *Samms* v. *Chicago Title & Trust Co.*, 349 Ill. App. 413, 111 N. E. 2d 172 (1953), involved a mortgage of real estate, a mechanic's lien and a federal tax lien. The federal tax lien was afforded priority over the mechanic's lien but the amount of the mechanic's lien was satisfied out of the mortgage.

The court said:

> "It is our conclusion that the claim of the mechanic's lienholder in this case is not within the meaning of Section 3672 and is subordinate to the lien of the government's tax claim. This priority of the government's lien, if only the mechanic's lien were here involved, would be full and complete as to all proceeds derived from the sale of the property resorted to. However, where, as in this case, there is a mortgage which is a lien prior to that of the government's tax claim, then the government for satisfaction of its lien can only resort to those proceeds from the sale of the property which are in excess of the mortgage indebtedness. Therefore, the priority of the government's lien in the instant case is only as to that excess. *The mechanic's lien claimant* by state law is given a lien prior to that of the mortgagee, which in effect means that it *may resort to the proceeds from the sale of the property which are applicable to payment of the mortgage indebtedness.* This is the inevitable result of the application of the Act of Congress and of the state law." (our italics)

So uniformly has this solution been followed by federal and state courts that it might almost be said to have become an established rule of property law.

See: *Southern Ohio Savings Bank & Trust Co.* v. *Bolce* and *Renner* v. *Merriweather*, 165 Ohio St. 201, 135 N. E. 2d 382 (1956); *River Rouge Savings Bank* v. *Victor Building Co.*, 359 Mich. 189, 101 N. W. 2d 260 (1960); *Buffalo Savings Bank* v. *Victory*, 62-1 U.S.T.C. § 9106 (Supreme Court of N. Y., 1961); See also *United States* v. *Buffalo Savings Bank*, 371 U. S. 228, 9 L. Ed. 283, 83 S. Ct. 314.

(b) Construction of Federal Insolvency Statute not fairly raised by case

As early as 1805 this Court, through Chief Justice Marshall, held that the Federal Insolvency Statute did not give debts due the United States priority over prior deeds of trust. *United States* v. *Hooe*, 3 Cranch 73. That this principle has continuing vitality was indicated by this Court at least as recently as 1941. *United States* v. *Texas*, 314 U. S. 480, 484; 62 S. Ct. 350, 354; 86 L. Ed. 356.

Petitioner seeks to cast doubt on these cases by stating that "under West Virginia law a deed of trust does not divest the debtor of title . . . ." This statement is dubious in the light of a long line of decisions in both Virginia and West Virgina. See *Poage* v. *Bell*, 8 Leigh 604 (1837), *Martin* v. *Kester*, 46 W. Va. 438, 33 S. E. 238, and *Citizens National Bank* v. *Harrison-Doddridge Coal Co.*, 89 W. Va. 659, 109 S. E. 892, 894.

However, it is unnecessary to labor the question, for neither the reaffirmation nor the abandonment of the principle that previously executed mortgages defeat the priority of the United States under the Federal Insolvency Statute would be determinative in the present case. It could only be *obiter dicta*. The circuity problem would exist, regardless of whether the Petitioner's lien is prior to that of the S.B.A. because of a judicially created exception to the Federal Insolvency Statute or because of a purported agreement to subordinate the S.B.A.'s deed of trust. The reason for Petitioner's priority is immaterial.

In either event, as in the previously and hereinafter cited circuity cases, an orderly sequence of priorities provided by state law was interfered with by the interjection of a federal statute giving a federal lien priority over a local lien which under state law would have had first priority. A circuity problem was injected only by the creation of an additional lien admittedly superior in priority to the federal lien but inferior to the first local lien.

In the present case, the circuity problem is created because the Federal Insolvency Statute admittedly gives the Small Business Administration's deed of trust priority over this Respondent's mechanic's lien and it can make no difference to its solution why the Bank's deed of trust is superior to the S.B.A.'s.

III. The Decision Is Consistent with Those of Other Federal Courts.

As pointed out by Judge Sobeloff (pp. 48-50 of Petition) the Fourth Circuit in approving the Special Master's resolution of the circuity problem was merely following the "federal policy" in this area already applied by the Third Circuit in *In Re Lieb Bros., Inc.*, 251 F. 2d 306, by the Fifth Circuit in *Exchange Bank & Trust Co.* v. *Tubb Manufacturing Co.*, 246 F. 2d 141, a case involving the Federal Insolvency Statute, and by a First Circuit District Court, in *United States* v. *Lord*, 155 F. Supp. 105 (D.N.H. 1957). There is no contrary federal authority.

IV. The Decision Is Consistent with Applicable State Law.

The decision below gives effect to the unequivocal language of the pertinent West Virginia statute Section 17, Article 2, Chapter 38 previously cited giving this Respondent a lien superior to the Petitioner's trust deed.

It is consistent with the only West Virginia authority on the circuity subject, a decision of the Circuit Court of Kanawha County. This case, *Hopkins* v. *Eureka Coal Company*, 33 Am. Fed. Tax Rep. 1627 (1944) another case involving the Federal Insolvency Statute, required determination of the respective priorities of a federal tax lien, a mortgage, a trust deed and tax liens of the State of West Virginia. Finding the mortgage and trust deed superior to the federal tax lien and the federal tax lien superior to those of the State, the Court then found that from the amounts paid the holders of the mortgage and trust deed must be paid the liens of the State, those being superior to the mortgage and trust deed.

V. The Decision of the Court of Appeals Is Plainly Right.

Petitioner has been paid $205,456.44 from the sale of the motel, the Respondent contractor has been paid $228,698.47, and the balance of the $700,000.00, after costs and minor claims, is credited to the S.B.A.'s purchase price.

Under Petitioner's proposed solution the contractor's $228,698.47 would be taken from him and given

to Petitioner. The contractor would receive nothing from the $700,000.00 realized from the sale.

In sum Petitioners asks a resolution of the circuity problem that will require Respondent to bear the entire burden of Petitioner's careless lending practices, and will penalize Petitioner not at all.

CONCLUSION

For the foreging reasons it is respectfully submitted that the petition for certiorari should be denied.

SPILMAN, THOMAS, BATTLE & KLOSTERMEYER,
William B. Maxwell, III
Of Counsel

P. O. Box 273
Charleston,
West Virginia 25321

HOWARD R. KLOSTERMEYER
P. O. Box 273
Charleston,
West Virginia 25321
Attorneys for Respondents

H. B. Agsten & Sons, Inc. and William H. Meiners, d.b.a. General Floor Company

March 25, 1968

CERTIFICATE OF SERVICE

The undersigned counsel for the Respondents H. B. Agsten & Sons, Inc. and William H. Meiners, d.b.a General Floor Company does hereby certify that on the 27 day of March, 1968, I served copies of the foregoing brief on the Petitioner and other Respondents in this action in accordance with Paragraphs 1 and 2(a)

of Rule 33, Revised Rules of the Supreme Court of the United States, as follows:

Upon Petitioner, Huntington Trust & Savings Bank, a corporation, by depositing the same in a United States Post Office with first class postage pre-paid, addressed to its counsel of record, David M. Baker, Edward H. Greene and Lawrence L. Pauley, 419 Eleventh Street, Huntington, West Virginia 25701.

Upon respondents, Bernard L. Boutin, Administrator, Small Business Administration, and Odus R. Kincaid and Delbert E. Williams, Trustees, by depositing the same in a United States Post Office with first class air mail postage pre-paid, addressed to their counsel of record, Morton Hollander and John C. Eldridge, Attorneys, Department of Justice, Washington, D. C. 20530, and in addition, by depositing a copy thereof in a United States Post Office with first class air mail postage pre-paid, addressed to Solicitor General, Department of Justice, Washington, D. C. 20530.

Howard R. Klostermeyer

HOWARD R. KLOSTERMEYER
P. O. Box 273
Charleston,
West Virginia 25321
Attorney for Respondents